Supreme Court, U.S.
FILED
OCT 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-519

IN THE

Supreme Court of the United States

October Term, 1985

DR. WILLIAM C. RANDALL, DR. ROGER E. AUSTIN, DR. TOM W. ANDERSON and DR. MYREL A. NEUMANN,

Petitioners,

v.

B. J. LOFTSGAARDEN; ALOTEL INCORPORATED, a Minnesota corporation; PROPERTY DEVELOPMENT AND RESEARCH COMPANY, a Minnesota corporation; and 2361 BUILDING CORPORATION, a Minnesota corporation,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

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1985—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

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25 pp

REASONS FOR DENYING THE WRIT

1. Calculation of damages the only issue.

2. The fact issues make this case one of narrow application. All Petitioners had experienced complete recapture and had their tax returns audited and closed. These facts distinguish this case from the broad field of cases where questions of amended returns and "illusory damages" have arisen.

3. Actual out-of-pocket loss by the group of Petitioners is small, ($14,477.00) including interest, yet two trials and two appeals have resulted in award of $75,000.00 attorneys' fees to Petitioners' lawyers.

4. The decision of the Eighth Circuit Court with the respect to the calculation of damages is the appropriate remedy in this particular case.

5. There is no conflict between the decision of the Eighth Circuit and the Ninth Circuit or Second Circuit.

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DR. WILLIAM C. RANDALL, DR. ROGER E. AUSTIN, DR. TOM W. ANDERSON and DR. MYREL A. NEUMANN,

Petitioners,

v.

B. J. LOFTSGAARDEN; ALOTEL INCORPORATED, a Minnesota corporation; PROPERTY DEVELOPMENT AND RESEARCH COMPANY, a Minnesota corporation; and 2361 BUILDING CORPORATION, a Minnesota corporation,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully prays that a writ of certiorari to review the en banc judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 16, 1985 be denied.

STATEMENT OF THE CASE: ADDITIONAL FACTS

All of Petitioners' investments went to Alotel Associates, a Limited Partnership whose sole asset was a single motel including all furnishings. Alotel Associates is not a party to these proceedings. No proof was offered to support any assertions that the Respondent profited. The project came

up short on needed construction capital but was completed by Respondent at his expense.

The four Petitioners all purchased their 4½ partnership interest sometime in 1973 and held them through final foreclosure of the project in 1978. Holders of the rest of the 20½ units did not pursue any claim, although all were named as original parties. They, like Petitioners, had recovered substantially all or more than all of their investment through the promised tax benefits. The Petitioners received tax benefits from the project in each of the years from 1973 thru 1978 and paid their full taxes arising out of recapture when the property was foreclosed. The Petitioners have stipulated and the Court has found that even after payment of recapture taxes, Petitioners have retained permanent net tax benefits equal to between 84% and 108% of their investment. Full audits have been made and closed by the I.R.S. Calculations from the Petitioners' tax returns made by a C.P.A. and adopted by the Court show only a combined net $1,134.00 not so recovered, and interest on these amounts to be $13,339.00 (all four awards combined). The total balance in the amount of $14,477.00 was doubled to grant the Petitioners an additional amount (assuming they are in the 50% bracket still) to allow for taxes that would accrue on this additional recovery. Appendix A-22.

No tender of any of the securities nor any rescissionary demands were made by any of the Petitioners at any time prior to the foreclosure, and in fact, rescission was not demanded until shortly before the first trial when the Petitioners amended their claim for relief. At that time, and ever since, the Petitioners have had nothing to return in exchange for their claimed refund, as all of the property in the part-

nership had been foreclosed and the time for redemption had expired.

Respondent Loftsgaarden was General Partner until September 1975, the hotel having opened in June 1974. A mutual separation agreement was entered into and a successor General Partner was appointed by the limited partners. Loftsgaarden received nothing for his services, as compensation depended upon profits. Furthermore, he was not reimbursed for substantial monies advanced in behalf of the partnership. The partnership operated the property until sometime in 1978 without Respondent.

In accordance with the Offering Memorandum, each of the limited partners were required to sign a document certifying as follows:

a. He is aware that no federal or state agency has made any findings or determination as to the fairness for public investment, nor any recommendation nor endorsement of Units;

b. He recognizes that the Partnership has only recently been organized and has no financial or operating history and, further, that the Units as an investment involve a high degree of risk;

c. He is aware that there is no public market for Units and that it may not be possible readily to liquidate his investment;

d. He understands that the Units have not been registered with the Securities and Exchange Commission or under the securities laws of any state. The Units are being acquired for investment purposes and not for purposes of resale or other distribution.

e. He has carefully reviewed the Articles and, in making an investment in the Partnership, has relied solely thereon and on his independent investigation.

f. He has a net worth in excess of $200,000; or some portion of his income is subject to Federal and State income tax at a rate of 50% or more.

g. He is a resident of the State of Minnesota.

All of the named corporate Defendants are subchapter "s" corporations, wholly owned by Loftsgaarden, who was also the sole individual General Partner. For these reasons, the Defendants will be referred to herein as "Respondent" or "Loftsgaarden".

REASONS FOR DENYING THE WRIT

1. Calculation of Damages the Only Issue.

Respondent does not request review by the Supreme Court of the United States. The questions presented by the Petitioners relate only to damage calculations. Referring only to cases cited in the Circuit Court of Appeals opinion, the following were all the subject of Petition for Certiorari, which was denied:

Globus v. Law Research Serv., Inc., 418 F.2d 1276 (2d Cir.), *cert. denied*, 397 U.S. 913 (1970);

Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38 (2d Cir.), *cert denied*, 439 U.S. 1039 (1978);

Murphy v. Cady, 30 F. Supp. 466 (D. Me. 1939), *aff'd*, 113 F.2d 988 (1st Cir.), *cert denied*, 311 U.S. 705 (1949);

Shapiro v. Midwest Rubber Reclaiming Co., 626 F.2d 63 (8th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981); cf. 15 U.S.C. § 78BB (a);

Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976);

Garratz v. Stifel, Nicolaus & Co., 559 F.2d 1357 (8th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978);
Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

The following cases from the Petitioners' brief resulted in a denial of Certiorari:

John Hopkins Univ. v. Hutton, 297 F. Supp. 1165 (D. Md. 1968), *rev'd on other grounds*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974);
Janigan v. Taylor, 344 F.2d 781 (1st Cor.), *cert. denied*, 382 U.S. 879 (1965).

The instant case, while of significance to the litigants, just does not produce any issues of general interest beyond Court of Appeals level. The parties have been afforded ample review.

2. Narrow Application.

The instant case involves facts which narrow and limit the issue with respect to the deductibility of tax benefits from the award. All of the Petitioners held an interest in a partnership that lasted from sometime in 1973 through 1978 (in the case of one of the Petitioners 1979), at which time the property was foreclosed and the Petitioners experienced a complete recapture. Out of a total of 25 limited partnership units issued, only holders of 4½ units chose to pursue litigation. The others recognized that they had, in fact, gained substantial benefits despite the foreclosure. In *Austin v. Loftsgaarden*, 786 F.2d 949 (8th Cir. July 16, 1985), the Tax Division and the S.E.C. contended that the plaintiffs' tax benefits "may" prove to be illusory because

they "may" experience recapture upon sale or other disposition of the hotel. The Court said at Appendix A-11:

> "The plaintiffs claim that their tax benefits have not been received must also be rejected because they have stipulated that *they have received permanent tax benefits* from the investments in the Associates. (emphasis ours). . . . All of the plaintiffs in this case have already experienced all possible recapture when the hotel was foreclosed upon in 1978. . . . All of the plaintiffs' tax returns from the relevant tax years have already been audited and are now closed".

Thus the ruling in the instant case is limited to the narrow fact situation described above. The review of this case would not address the broader issues addressed by the two principal cases upon which the Petitioners rely: *Burgess v. Premier Corp.*, 727 F.2d 826, and *Western Federal Corp v. Erickson*, 739 F.2d 1439 (9th Cir. 1984). These are distinguished from the present case because in those cases it was held that amended returns would have to be filed under the tax benefit rule.

3. Actual Damages Small; Costs High.

Respondent has been ordered to pay to Petitioners' attorneys for four different proceedings, two in the lower court and two at the appellate level, a total of $75,000.00 plus costs in the amount of $8,278.32 making the total $83,278.32. The breakdown of fees and costs awarded is as follows:

	FEES RANDALL	FEES NEUMANN	COSTS RANDALL	COSTS ANDERSON, AUSTIN, NEUMANN
1st Trial	$10,000.00	$15,000.00	$1,308.62	$2,210.53
1st Appeal		$18,000.00		
2nd Trial	$10,000.00	$14,000.00		$3,111.30
2nd Appeal	$ 4,000.00	$4, 000.00	$1,647.87	
TOTAL FEES		$75,000.00	TOTAL COSTS	$8,278.32

This is in addition to the extensive legal fees already incurred by Respondent for its own attorneys. As against the foregoing figures, the actual damages of the four Petitioners is as follows:

Randall award	$ 253.00
Anderson award	$ 9,395.00
Neumann award	$ 992.00
Austin award	$ 3,833.00
TOTAL AWARD	$14,473.00

(Of the above amounts, $13,339.00 is interest). Appendix A-22.

Respondent submits that the proceedings have involved time and expense way beyond the amount of attention and time that should have been devoted to settling the same. As Judge Lord said in his order,

> "plaintiff Randall is struggling to further protract and complicate a *proceedings that has already dragged on far too long*. That will not be tolerated by this Court." (Emphasis ours). Appendix C-3.

The projected profit referred to in the prospectus never materialized. Loftsgaarden did not profit in any way from the venture. Instead, as General Partner, he paid extensive obligations of the partnership, including $46,000.00 unpaid interest after the partnership defaulted.

Respondent states to the court that he cannot continue to defend these proceedings, paying legal counsel on both sides. He has thus determined to proceed at this point Pro Se. Respondent suggests to the court that there is an additional inducement to prolonging and continuing the proceedings if attorneys' fees in substantial amounts are awarded at each juncture.

This case may well have come to rest before this point but for the incentive on the part of Petitioners' counsel to continue the litigation. Respondent is now in the process of paying the amounts adjudged against him, including all costs and attorneys' fees. This should end this over-protracted litigation.

Plaintiffs have lamented about the unjust "profit" they claim was retained by Respondent. The evidence and findings do not support this argument. The only finding about profit relates to a discrepancy between the schedule of projected application of funds in the offering memorandum and a projection in the first mortgage application. Appendix E-7 (o).

In *Austin v. Loftsgaarden* (2nd decision supra) the Court said:

> "We reject plaintiffs claim that we should ignore their tax benefits because otherwise the defendants will unjustly "retain" the consideration previously paid by the plaintiffs. First of all, it does not appear that the defendant has "retained" any of plaintiffs consideration; rather these monies were paid to the partnership and were invested in the project". Appendix A-13.

Respondent has incurred great losses both in the original partnership and in the defense of this action. Petitioners' counsel continue to argue the opposite without any factual support.

4. The Court of Appeals Ruling Was Correct.

Petitioners rely on *Western Fed. Corp. v. Erickson*, 739 F.2d 1439 (9th Cir. 1984), and *Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984), in which cases the Court discussed the damages being "illusory" and held that the tax consequences will "wash out" any prior tax savings.

In *Austin v. Loftsgaarden* (2nd decision supra), the Court clearly distinguished these cases as follows:

> "We need not address the contention of the Tax Division and the S.E.C. that the tax consequences of the rescissionary award will 'wash out' any prior tax savings, because we are not presented with such a situation in this case". Appendix A-12.

In making this distinction in *Austin v. Loftsgaarden* (2nd decision 1985 supra), the Court relied upon *Hillsboro National Bank v. Commissioner,* 460 U.S. 370, 103 S.Ct. 1134, 75 L.Ed.2d 130, 142-44 (1983); *Salcer v. Envicon Equities Corp.,* 744 F.2d at 943; 1 Mertens, Law of Federal Income Taxation, #7.34 at 7-115, #7.37 at 7-130.

In *Austin v. Loftsgaarden* (2nd decision 1985 supra), the Court went on to say at Appendix A-12:

> "The 'tax benefit rule' does not require elimination of tax benefits already received. See Hayden v. McDonald, 742 F.2d 440. Rather it provides that a tax payer who claims a deduction resulting in a tax benefit one year and who later obtains a recovery or repayment in a later year must include the recovery or repayment as ordinary income in the year of recovery". (*Hayden v. McDonald,* reversed in part).

Especially important is the distinguishing feature between the instant case and the *Burgess* case in that the *Burgess* case involved a fraudulent tax shelter. The only questions raised in *Austin v. Loftsgaarden* was with the respect to the issuing of the Offering Memorandum; it was conceded by all that the tax shelter was in itself entirely lawful and that the Government has audited all returns and accepted the same.

Austin v. Loftsgaarden (2nd decision 1985 supra), relies on *Salcer v. Envicon Equities Corp.*, 744 F.2d at 943:

> "Nor can we agree with the notion that a ruling makes 'the Government the banker for fraudulent tax shelter activity.' Burgess v. Premium Corp., supra, 727 F.2d 838. As Judge Broderick noted there was no such activity in this case; the fraud, if any, pertained only to the investment aspects of the Greenspoint Project. The Government got the residential development that it hoped to encourage by offering the tax benefits taken by the plaintiffs. Thus it is 'banking' precisely what it agreed to 'bank'. There is suggestion that the project did not meet Federal requirements as a viable housing development entitling its owners to tax benefits".
>
> "There is no legal justification for awarding a party damages to which he is not entitled merely to provide revenue for the Government to tax". Appendix A-14.

In answer to the Petitioners' argument that the words "actual damages" do not appear in the 1933 Act, the Court in *Austin v. Loftsgaarden* (2nd decision) says:

> "Although the words 'actual damages' do not appear in the 1933 Act, the Courts have nonetheless applied the actual damages principle of section 28(a) to bar punitive damages under section 17(a) of the 1922 Act, Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1278, 1283-86 (2d Cir.), cert. denied, 397 U.S. 913 (1970), and have construed the rescission and restitution remedy provided by section 12 (2) as substantially equivalent to the damages permitted under section 28(a). Affiliated Ute Citizens v. United States, 406 U.S. 128, 155 (1972). The goal of rescission under section 12 (2) is to return the parties to the status quo ante, 'and hence a plaintiff can recover no more

than his or her "net economic loss",' i.e., 'actual damages' ". *Salcer,* 744 F.2d at 940; *Austin I,* 675 F.2d at 181; *Rolf v. Blyth, Eastman Dillon & Co., 570* F.2d 38, 49 n.22 (2d Cir.), *cert. denied,* 439 U.S. 1039 (1978). Appendix A-8, A-9.

In regard to tax benefits received and "actual damages" see *Salcer v. Envicon Equities Corp.,* 744 F.2d 935, 940 (2d Cir. 1985):

" 'Actional damages', as used in the Exchange Act, means 'compensatory damages,' *id.* and hence a plaintiff cannot recover more than his or her 'net economic loss.' Marbury Management, Inc. v. Kohn, 470 F. Supp. 509, 516 (S.D.N.Y. 1979), aff'd in part, rev'd in part, 629 F.2d 705 (2d Cir.), cert. denied, 449 U.S. 1011, 101 S.Ct. 566, 66 L.Ed.2d 469 (1980). It is not within our power to ignore benefits bargained for and received by plaintiffs as a result of the transaction at issue, which represent real economic value mitigating any loss they may have suffered."

"The importance of this aspect of the investment is recognized in decisions awarding damages for failure of the tax advantages of shelters to live up to the seller's representations. See, e.g., Sharp v. Coopers & Lybrand, 649 F.2d 175 (3d Cir. 1981) (holding accounting firm liable for acts of employee in preparing tax opinion letter), cert. denied, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982)."

*Austin v. Loftsgaarden (*1985) 2nd decision:

"The goal of prejudgment interest is to compensate plaintiffs for the loss of the use of their money. See Cant v. A. C. Becker & Co., 384 F. Supp. 814 (N.D. Ill. 1974); Chris-Craft Industries, Inc. v. Piper Aircrafter Corp., 384 F. Supp. 507, 527 (S.D.N.Y. 1974), modified, 516 F.2d 172 (2d Cir. 1975), rev'd on other

grounds, 430 U.S. 1 (1977). Because plaintiffs were not deprived of the use of the entire amount of their investments over the ten year period, prejudgment interest is due only on the amount of money they were out-of-pocket at any given time. Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1307 (2d Cir. 1973) (prejudgment interest should be computed on the "net difference between value of assets given and value received"). Murphy v. Cady, 30 F. Supp. 466, 470 (D. Me. 1939), aff'd, 113 F.2d 988 (1st Cir.), cert. denied, 311 U.S. 705 (1940). Appendix A-19, A-20.

Cases cited by Petitioners that support Respondent:

Smith v. Bader, 83 F.R.D. 437;
Bridgen v. Scott, 456 F. Supp. 1048 (S.D. Tex. 1975);
Houlihan v. Anderson-Stokes, 78 F.R.D. 232 (1978);
Hokama v. B. F. Hutton & Co., Inc., 566 F.2d 836 (1983).

Cases cited by Petitioners that are not security cases and therefore do not involve a tax shelter security produced and marketed by a defendant:

Iowa-Des Moines National Bank v. Schwerman, 288 N.W.2d 198;
Harris v. Metropolitan Mall, 334 N.W.2d 519 (Wisc. 1983);
G. & R. Corp. v. American Sec. Trust Co., 523 F.2d 1164 (C.D. Cir. 1975);
Cereal Bi-products Co. v. Hall, 16 Ill. App.2d 81, 147 F.2d 383.

The following cases cited by Petitioners are distinguished in their fact situation in that they do not present facts involving foreclosure, recapture, and previously paid taxes:

Eisenberg v. Gagnon, 766 F.2d 770 (1985);
Borovoy v. Burser Realty Corp., 86 Mich. App. 732, 273 N.W.2d 545 (1979);
Spatz v. Borenstein, 513 F. Supp. 571 (N.D. Ill. 1981).

5. There Is No Conflict Between the Decision of the Eighth Circuit and the Ninth Circuit or Second Circuit.

Petititoner urges that the Court consider this issue to resolve conflicts between Circuits.

The real distinction between *Burgess* and *Austin* is found in *Burgess* itself where *Burgess* considered the *Austin* case and distinguished it. The Court said that the plaintiffs in the *Burgess* case were presumed to be required to amend original returns and therefore a full recovery was required to put them back into their original situation. The opposite is true in the *Austin v. Loftsgaarden* case where the plaintiffs have paid their taxes on the entire amount they have received as recapture on foreclosure. Therefore neither the *Burgess* nor *Western* cases are in conflict but are distinguished by the fact situation.

The history concerning the Second Circuit's addressing the tax benefit question is described in *Salcer v. Envicon Equities Corp.*, 744 F.2d 935 (2d Cir. 1984) at 939:

> "We have never addressed a question of whether in an action alleging fraud with the respect to a tax shelter investment, the plaintiffs recovery must be reduced by tax benefits received."

We find that two years earlier in the case relied upon by Petitioners, *Western Fed. Corp. v. Davis,* 553 F. Supp. 818 (1982), the following:

> "While the statute mentions only 'income' as a credit against the amount paid, courts have held that economic benefits such as tax deductions must be taken into account in determining what must be restored. Austin v. Loftsgaarden, 675 F.2d 168, 181-83 (8th Cir. 1982). See also Dupuy v. Dupuy, 551 F.2d 1005 (5th Cir.), cert. denied, 434 U.S. 911, 98 S.Ct. 312, 54 L.Ed.2d 197 (1977); Smith v. Bader, 83 F.R.D. 437 (S.D.NY. 1979); Bridgen v. Scott, 456 F.Supp. 1048 (S.D.Tex. 1978)."

The 1979 case of *Smith v. Bader,* 83 F.R.D. 437 (S.D. N. Y. 1979):

> "The plaintiffs' investments in other partnerships and their investments in other tax shelters may shed light on their sophistication as investors. Similarly, knowledge of plaintiffs' income tax rate and the net value of their investment in the partnership, along with other information, may be needed to calculate any tax benefits which may mitigate damages. See Dupuy v. Dupuy, 551 F.2d 1005 (5th Cir. 1977), cert. denied, 434 U.S. 911, 98 S.Ct. 312, 54 L.Ed.2d 197 (1977); Bridgen v. Scott, 456 F.Supp. 1048, 1062 (S.D.Tex. 1978); Houlihan v. Anderson-Stokes, Inc., 78 F.R.D. 232, 234 n.1 (D.D.C. 1978)."
>
> "Accordingly, plaintiffs are to produce their tax returns for defendants' inspection within ten (10) days."

The above cases are more recent than the relatively early F.R.D. cases cited by Petitioners in the Second Circuit, *Cooper v. Hallgarten & Co.,* 34 F.R.D. 484, and *Wiesen-*

berger v. W. E. Hutton & Co., 35 F.R.D. 556, 557 (S.D. N.Y. 1964).

In *Bridgen v. Scott*, 456 F. Supp. 1048 (S.D.Tex. 1978), the Court said:

> "Recision calls for cancellation of the bargain, and the return of the parties to the *status quo ante;* where this is impossible because of the disposal or retirement of the stock, . . . what restitutional damages are to be awarded must depend upon the facts of the particular case."
>
> "In Garnatz v. Stifel, Nicolaus & Co., Inc., supra, at 1360, the Eighth Circuit said that the court's '. . . function is to fashion the remedy best suited to the harm.' The trial court in calculating damages not only may, but should, look to particular factors, unique in each case, in reaching that determination."
>
> "Requiring the jury or this Court to try this case without reference to the tax consequences of the transaction would be requiring the jury and the Court to live in an artificial 'never-never land.' The plaintiffs' position that the tax consequences of this transaction should be ignored is simply not realistic and is tantamount to requesting this Court and the jury to try this case blindfolded."

The *Western Fed. Corp. v. Erickson case* (supra) can be seen, then, to approve and support *Austin v. Loftsgaarden,* but the Court simply found that the facts were different; page 820:

> "The amounts claimed as a deduction and the amounts later reported as income will wash out and the net tax benefit will be nothing. In this case, the economic benefit by way of a tax deduction, therefore, is illusory.

Salcer v. Envicon Equities Corp. (supra), is not in conflict with *Western Fed. Corp. v. Erickson.* It simply found the facts to be similar to the *Austin v. Loftsgaarden* in that the benefits by way of tax deduction would not be washed out and would not be "illusory".

> "To the extent that plaintiffs invested in a tax shelter, all benefits they received from their investment, including tax benefits, would have to be deducted in calculating the rescissionary damages, if any, to which they would be entitled."
>
> "The contention that the tax benefit doctrine applies to this case suffers from some basic misconceptions. It fails to distinguish between actual rescission, which is impossible in this case because of the forced sale of the project, and rescissionary damages, which are not the same as rescission and may be awarded when actual rescission is unavailable."
>
> "In short, the 'tax benefit doctrine' does not dictate the district court's decision but depends for its applicability upon the substance of that decision. To hold as the government urges would put the cart before the horse."

As to the collateral source argument, it may appear that, on first blush, *Western Fed. Corp. v. Erickson* (supra) is in conflict with *Salcer v. Envicon Equities Corp.* (supra) in the *Federal Corp.* case at P. 821:

> "Rescission is an equitable remedy to return parties to their prior positions and to work fairness to them. It was not the defendants who gave the tax benefits to the plaintiffs. It was the Government. If the defendants were to be given a credit for the value of the use of the money, that credit would reduce the amount of income that the Government would recapture under the

> tax benefit rule. In effect, the reduction in the amount that the defendants would have to return would only be at the Government's expense."

Whereas in *Salcer v. Envicon Equities Corp* (supra), at p. 941:

> "The essence of the collateral source rule is the independence of the transaction giving rise to the collateral source, such as the insurance policy. Here, in contrast, the tax benefits, although paid by the government, emanate directly from the tax shelter sought by the plaintiffs and provided by defendants, without which plaintiffs could not have realized any tax benefits. Benefits resulting directly from a transaction under attack must be credited toward the damage award.
>
> "The fact that the tax benefits were paid by the government rather than by the defendants does not lessen the defendants' role in securing them. To hold otherwise would be to confer an undeserved windfall upon the plaintiffs."

A closer examination would reveal that the arguments are mutually consistent. In the *Western Fed. Corp.* case, the Court found that there had been no recapture and that therefore there would be a wash out and the plaintiffs would not have already paid taxes on the recapture. Therefore the rule in that case and in that situation is consistent with *Salcer v. Envicon Equities Corp.*, and with *Austin v. Loftsgaarden.*

Burgess v. Premier Corp. (supra), presented a fraudulent tax shelter situation affecting value. Neither *Burgess* nor *Western Fed.* involved a factual situation where it had been stipulated that a complete recapture, audit, and closed return had occurred.

The Second Circuit decision, *Salcer v. Envicon Equities Corp.*, is in accord wtih the instant case and relied upon by the Eighth Circuit. There is no conflict between these two Circuits.

The *Austin v. Loftsgaarden* decision applies only to cases in which tax shelter is a substantial factor in connection with investor goals. Out of $157,500.00 invested, all but $14,473.00 has been recovered after recapture (including $13,339.00 interest). The investment was a lawful one and the I.R.S. has audited all returns and they are closed. Appendix A-22.

Finally, the Petitioners were certainly made whole by reason of the doubling of the award.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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